Retrospect and Prospect on Korean Antitrust Law

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Abstract

In restrospect, this paper considers and evaluates the development of the Korean Antitrust Act, which is the fundamental law of the economic order, since 1981.
The direct objective of the Act is to promote free and fair competition, as well as to prevent the concentration of economic power. Its ultimate objectives, however, are the stimulation of creative business activities, consumer protection, and the promotion of the balanced development of the nationl economy. The Act contains substantive law regulations on monopolies and oligopolies, mergers, anti-competitive collaborative acts, unfair trade practices, ect. The Act also establishes a regulatory agency, the Fair Trade Commission, and puts in place enforcement procedures.
The Korea Antitrust Act has "come of age." It has made the nation as a whole aware of the importance of the fair trade system and made a substantial contribution to the correction of anti-competitive or unfair trade practices. It has not, however, reached the point of taking its rightful place as the foundation of the Korean economic oder because it has not converted monopolized and oligopolized market structures to competitive ones, nor has it prevented the excessive concentration of economic power.
Looking ahead, this paper outlines wide-ranging proposals to reform the Act, including its substantive, organizational and procedural aspects. In particular, the Fair Trade Commission needs to devote itself solely to the work of maintaining and realizing the proper functioning of the market economy. Political issues such as the prevention of the concentration of economic power should be transferred to a separate body. Further, private remedies should be promoted in order to correct unfair trade practices.

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I. The Objectives of Korean Antitrust Law

A. Objectives of Korean Antitrust Law

1. The Direct Objectives of the Korean Antitrust Act

Korea enacted the Monopoly Regulation and Fair Trade Act (the Korean Antitrust Act, hereinafter referred to as "the Act") to promote free competition and fair trade in 1981. The Act has as its direct objective the promotion of fair and free competition. Fair and free competition is a necessary condition for permitting the market economy to function normally. Accordingly, countries that consider the market economy to be the foundation of their economic order generally have this type of law. In this sense we call the Antitrust Law the fundamental law of the economic order. A competitive market indicates a market in which commodities are sold at the price of the production cost plus reasonable profit and in which people willing to pay this price can purchase these commodities. However, for a certain market to satisfy these conditions, the market must be open to all enterprisers having the will and ability to participate in it (open market), and the participating enterprisers must be able to compete freely without any restriction (free competition). Further, the competition between enterprisers must be engaged in fairly, centring on better quality and lower price (fair competition). The stage of competition having all of these three great principles of competition is called "perfect competition". However, in order to realize perfect competition, it must have the following elements. (1) All sellers produce perfectly identical products, so if we assume the products to be the same price, there is no difference from which seller the customer purchases. (2) The relative weight, within the whole, that the respective sellers active in the market take up is very small, so that even if the seller were to increase or decrease production volumes or, to an extreme, they were to withdraw completely from that market, that fact would not influence the decisions of other sellers in that market. (3) All capital is completely fluid and substitutable and all sellers can access equally necessary capital. (4) All participants in that market are well acquainted with price, production volumes and other information related to that market. Generally, as a certain market comes to satisfy these conditions, that market comes to function more competitively. However, as perfect competition is a

theoretically ideal model, it is not only extremely difficult to realize this, but it is also not necessarily desirable to enforce this legally. Accordingly, various countries' anti-trust laws do not have the realization of perfect competition as an objective, but have the purpose of realizing "workable competition", and this is no different in the case of the Republic of Korea (herein "South Korea"). The Korean Antitrust Act, in order to realize workable competition or fair and free competition, prohibits or restricts the abuse of market dominating position, market restrictive mergers, anti-competitive collaborative activities, unfair trade practices etc. that restrict this or prevent the realization of workable competition.

On the other hand, the objective of preventing the concentration of economic power was added at the time of the first revision of the Act in 1986. The expansion of these objectives, even if not expressed clearly in Article 1, the objectives provision of the Act, is a fact that cannot be denied if one looks at the content of the Act. However, many doubts have been raised as to whether it is indeed proper in legislative theory to add the prevention of the concentration of economic power as an objective of the Antitrust Act. In any case, the Act, for the prevention of concentration of economic power, provides for regulations such as restrictions on the establishment of holding companies, the prohibition of financial investment in companies affiliated to large enterprise groups, restrictions on the gross amount of investment, the prohibition of mutual debt guarantees and the prohibition of unfair support activities.

However, when referring to a fair "trade", the concept of "trade" is a broader concept than the concept of "competition". The reason is that as fair competition means that competition between enterprisers needs to be centred on price and quality, it primarily takes as its object the mutual relationships between competitors. On the other hand, fair trade takes as its object not only the mutual relationships between competitors but also the relationships between enterprisers and consumers.

2. The Ultimate Objectives of the Korean Antitrust Act

The Antitrust Act has, through the promotion of fair and free competition, the prevention of concentration of economic power and the establishment of a fair (and sound) trade order, and the ultimate objectives of the stimulation of creative business activities, consumer protection, the promotion of the balanced development of the

national economy.

II. Promotion of Fair and Free Competition

A. Regulation under the Antitrust Act

The Antitrust Act, for the maintenance of free competition and the establishment of a fair trade order, either prohibits or restricts acts that restrict or impede these objectives. However, here we consider the content of the Act by dividing it into substantive law regulations, organizational law (i.e. concerning the regulatory agency), and procedural law regulations.

1. Substantive Law Regulations

a) Control of Monopolies and Oligopolies

The methods adopted in countries for controlling monopolies and oligopolies are not necessarily uniform. There are countries that prohibit monopolies and oligopolies themselves in principle (cause prohibition) and those that allow monopolies and oligopolies while controlling only the negative effects resulting from them (negative-effect regulation). Korea takes the latter stance. That is, the Act views enterprisers in monopolistic or oligopolistic positions as "market-dominant enterprisers" and prohibits conduct abusing that position (Article 3(2)). However, in specific cases it is not at all easy to judge which enterprisers occupy market-dominant positions. Accordingly, in order to reduce these difficulties, the Act takes market share as a criterion and establishes a system deeming certain firms as market dominant enterprisers (Article 4).

On the other hand, the Act, by simply prohibiting enterprisers' abuse of market dominant positions, takes the view that the reformation of monopolistic or oligopolistic market structures into competitive markets is difficult. It imposes on the Fair Trade Commission the duty to establish and implement competition policies to promote competition regarding markets maintaining monopolistic or oligopolistic market structures for extended periods of time (Article 3).

b) Restriction of Mergers

The Act, in order to prevent enterprisers from establishing or strengthening monopolies or oligopolies through mergers, prohibits in principle mergers that substantially restrict competition in a relevant market (Article 7(1)). However, because judging whether a merger substantially restricts competition in a relevant market in particular cases is very difficult, the Act, through its fifth amendment in 1996, deems these to substantially restrict competition in a relevant market in cases satisfying certain conditions (Article 7(4)). However, the merger may be authorised exceptionally where the effect of the increase in efficiency due to that merger is larger than the negative effect from the restriction of competition or the merger is for the relief of failing companies (Article 7(2))

On the other hand, the Act, in relation to mergers carried out by coercive or other unfair methods, prohibits these *per se* without considering the issue of the influence that they have on competition (Article 7(3)).

c) Restriction of Anti-competitive Collaborative Acts

The Act, to prohibit anti-competitive collaborative acts whereby enterprisers act in collaboration with other enterprisers, stipulates that it is illegal for enterprisers to agree with other enterprisers by contract, agreement, resolution, or any other means to jointly engage in collaborative activities that unreasonably restrict competition (Article 19(1)). Further, as it is not easy to distinguish whether a certain enterpriser's acts were engaged in collaboratively with other enterprisers, to lessen these difficulties, the Act presumes that there is anti-competitive collaborative conduct in cases where more than two enterprisers engage in conduct pertaining to the respective clauses in Article 19(1) of the Act, even in cases where there is no explicit agreement between the same enterprisers promising to engage in this conduct (Article 19(5)). However, collaborative activities are permitted exceptionally in cases where they have received the authorization of the Fair Trade Commission in cases of industry rationalization, research and technical development, economic recessions, improving industrial structure, rationalising trade terms and conditions and improving the competitiveness of small and medium enterprises.

d) Prohibition of Unfair Trade Practices

The Act, in order to establish a fair trade order, prohibits enterprisers from engaging in seven categories of conduct likely to impede fair trade or to force affiliated companies or other enterprisers to engage in such an act (Article 23(1)). The Act provides that these categories of unfair trade practices and their standards shall be determined by Presidential Decree (Article 23(2)).

e) Enterprisers Organization etc.

The Act prohibits acts unfairly restricting competition and unfair trade practices by enterpriser organizations (Article 26) and prohibits resale price maintenance in principle (Article 29(1)). However, in terms of maximum price maintenance, one can maintain resale prices exceptionally in the case where there are justifiable reasons (Article 29(1)), in the case of literary works prescribed by the Presidential Decree or in the case where the enterpriser has received designation in advance from the Fair Trade Commission for commodities satisfying the conditions in the respective clauses of Article 29(2) of the Act (Article 29(2)).

Further, while the Act prohibits in principle the conclusion of international agreements containing matters pertaining to anti-competitive collaborative activities, unfair trade practices and resale price maintenance, the Act exceptionally allows these in the case where the Fair Trade Commission authorises that the influence that the contents of the relevant international contract have on competition in a relevant market is slight or that there are other unavoidable reasons (Article 32).

f) Exemptions from Application of the Act

Since the Act is the fundamental law for the market economy, the principle is that it applies to all conduct of enterprisers in all fields of industry. However, because there are cases where it is inappropriate to apply the Act *mutatis mutandis* in some fields of industry or to some enterprisers, the Act exempts legitimate actions taken pursuant to Acts and subordinate laws from the application of the Act.

2. Regulatory Agency: Fair Trade Commission

The Act creates the Fair Trade Commission (hereinafter referred to as "KFTC" or "Commission") under the jurisdiction of the Prime Minister for the purpose of independently performing its affairs pursuant to the Act (Article 35(1)). The KFTC performs its affairs as a central administrative organ pursuant to Article 2 of the Government Organization Act (Article 35(2)). The KFTC is composed of nine commissioners, including a chairman and a vice-chairman, of whom four are non-standing commissioners (Article 37(1)). The President appoints the commissioners of the Commission upon the recommendation of the Prime Minister, in the case of the chairman and deputy-chairman, and upon the recommendation of the chairman, in the case of the other commissioners, from: (1) public officials of grade II or higher with experience in monopoly regulation and fair trade; (2) judges, prosecutors, or attorneys with a minimum of fifteen years experience; (3) associate professors, professors, or the equivalent at certified research institutes with a minimum of fifteen years experience and who majored in law, economics, or business administration at their respective universities; and (4) business managers or individuals engaged in consumer protection activities with a minimum of fifteen years experience (Article 37(2)). Meetings of the Commission are divided into plenary sessions composed of all commissioners and chamber meetings composed of three commissioners including one standing commissioner (Article 37(2)).

On the other hand, the KFTC has a secretariat established within it for the purpose of carrying out its affairs (Article 47). Within the Secretariat are, as subsidiary bodies, the General Affairs Division, the Policy Bureau, the Monopoly Bureau, the Competition Bureau, the Consumer Protection Bureau, the Subcontracting Bureau and the Investigations Bureau. Under the commissioner there is a public affairs officer and an auditor and under the secretary-general there is a planning and management officer and a court liaison officer. Further, for the purpose of managing the affairs of the Commission regionally, there are regional fair trade offices established in Busan, Gwangju, Daejeon and Daegu (See Fair Trade Commission Internal Rules, Presidential Decree No. 16725).

3. Enforcement Procedures etc.

a) Investigation of violations and corrective measures, appeals, and appeal suits

The Commission may conduct necessary investigations *ex officio* in the cases where it has itself become aware or received a report of the fact of a violation of the provisions of the Act (Article 49). As a result of the investigation, it can hand down corrective measures (Articles 5, 16, 21, 24, 27, 31, 34) or it may make a recommendation for correction of the violation and advice compliance with this (Article 51). The Commission first adopted an extraterritorial application of the Act to the international graphite electrodes cartel from 2002. Grounding provision for extraterritorial application of the Act were introduced by the revision in December 2004. However, persons with objections regarding the Commission's measures can lodge an appeal with the Commission (Article 53), and file an appeal suit in the Seoul Appellate Court (Articles 54, 56).

On the other hand, in the case where an enterpriser that has received a corrective measure under the provisions of the Act has instituted an appeal, the Commission may, at the request of one of the parties or *ex officio*, decide to suspend enforcement of such orders or a continuance of procedures, where it deems this necessary to prevent irrevocable damage or harm caused by the enforcement of such orders or the continuance of procedures (Article 53-2).

b) Imposition of surcharge

The Commission may impose a surcharge upon a person who violates the provisions of the Act (Articles 6, 17, 22, 24-2, 28-2, 31-2, 34-2) and must take into account the nature and degree, duration and frequency, and the size of the benefit accrued by the unlawful practice (Article 55-3). Further, in the case where the person subject to a surcharge payment does not pay the surcharge within the period of payment the Commission may collect an additional surcharge. In such a case, the Commission may give notice fixing a period and, where either the surcharge or additional surcharge is not paid during this designated period, collect this following the example of national tax collection measures (Article 55-5).

c) Damages

Enterprisers or enterpriser organizations, in the case where they violate the provisions of the Act thereby causing a person to suffer damage, are liable for the compensation of damages to the victim (Article 56). The Act was revised in December 2004 to adopt a system in which the court may presume the approximate amount of damage. This estimate is based on a consideration of the result of evidentiary investigation by the court when it is hard for the damaged parties to prove the amount(Article 57).

d) Penal Regulations/Provisions

A person who has violated the provisions of the Act through abuse of their market-dominating position, combination of enterprises by unfair methods or substantially restricting competition, anti-competitive collaborative acts or evasion of the law, is punishable by imprisonment for no more than three years or by a fine up to but not exceeding 200 million won (Article 66). A person who has violated the Act through unfair trade practices, resale price maintenance, conclusion of an anti-competitive international contract, or failure to comply with corrective measures of the Commission, is punishable by imprisonment for not more than two years or by a fine up to but not exceeding 150 million won (Article 67).

These offences can be prosecuted by public action only after the Commission has filed a complaint. However, the Commission is obliged to file complaints with the Prosecutor General where it deems that the degree of violation is so objectively clear and gross that it would markedly impede the competition order. The Prosecutor General may give notice to the Commission of the existence of facts substantiating a complaint and request the Commission to file a complaint with them. Further, the Commission may not withdraw a complaint after a prosecution has been commenced (Article 70).

B. Evaluation of Implementation of the Act

The Act came into force from April 1, 1981, so we can now say that it has passed the year of its "coming of age". However, evaluations regarding the enforcement of

the Act are not necessarily all positive. That is, while it is true that the Act has widely made the nation as a whole aware of the importance of the fair trade system and made a substantial contribution to the correction of anti-competitive or unfair trade practices, it is evaluated that it has not reached the point of taking its rightful place as the foundation of the Korean economic order through the conversion of the monopolized and oligopolized market structures to competitive one or the prevention of the excessive concentration of economic power.

One can see that the KFTC agrees generally with this evaluation when one looks at the fact that the Commission, on the occasion of the seventh amendment to the Act in February 1999, explained the background of this situation as follows. That is, their view was that the Korean economy overcame the pressing economic crisis in rapid time and that, in order to prepare the "stepping-stones" of systemic remedies, it was an urgent task to complete the structural adjustment of enterprises as soon as possible and to establish market economy principles in each area of the economy. That amendment fundamentally emphasized supplementing the systemic blockages so that the Act could carry out its various roles faithfully as the fundamental law for market economy, while improving and fixing related systems so that the structural adjustment of enterprises could be promoted without setback.

C. Proposals to Reform the Antitrust Act

The contents and procedures of the Antitrust Act, through its various recent amendments, have been supplemented substantially. In particular, on the occasion of the seventh amendment in February 1999, the Act had substantial parts of its various systemic blockages supplemented in order that it could carry out its various roles faithfully as the fundamental law for the promotion of the market economy. In spite of this, as the following issues are still contained in the Act, it needs to be improved urgently in order to raise its efficacy.

1. Substantive Law Aspect

a) Regulation of Monopolies and Oligopolies

Firstly, the Antitrust Act, in terms of prohibiting abusive conduct by a market-dominant enterpriser, establishes a system deeming "market-dominant enterprisers" based on the standard of their market share. However, as that deeming standard is extremely high, in spite of occupying a market-dominating position in reality, there are cases that are not regulated because they do not reach the standard. Accordingly, for the sake of raising the efficacy of the regulation of monopolies and oligopolies, it would be desirable to raise the deeming standard for market-dominating enterprisers to the German standard.

Furthermore, while the Antitrust Act lists the abusive conducts by market-dominating enterprisers by dividing them into 5 categories, as these provisions are abstract and the standards are vague, in specific cases it is very difficult to judge what conduct amounts to abusive conduct. Additionally, not only do the Examination Guidelines not necessarily clarify these standards, in some cases they include contents of dubious validity and do not greatly assist the practice of regulation. Accordingly, for the sake of raising the efficacy of the regime prohibiting the abuse of a market-dominating position, by analysing the trading activities of monopolist and oligopolist enterprisers in a positivist manner according to their respective type of industry and market and comparing and examining these with foreign and other domestic markets, there is a need to specifically define the categories of abuses of a market-dominating position and at the same time to specifically define the standards for judging abusive conduct through critically analysing and evaluating the decisions of the Fair Trade Commission and judgments of the courts.

b) Restriction of Enterprise Combinations

For the sake of raising the efficacy of the regulations prohibiting anti-competitive enterprise combinations, while the Antitrust Act establishes a regime deeming a "practical restriction of competition" in cases meeting set conditions, because these deeming standards are extremely high and hard to meet and there are also cases where they are not appropriate, they do not provide any particular assistance in

practice. Accordingly, in order for this deeming regime to be useful in regulating enterprise combinations in practice, there is a need to rationally revise the conditions in Article 7(4)(1) of the Act.

Further, while conglomerate mergers are the most significant type of merger in South Korea, they are very hard to regulate these because in these cases it is very difficult to judge the influence they have on competition. Accordingly, in order to effectively regulate conglomerate mergers, there is a need to deem their competition-restrictiveness in the case where they meet set criteria. The Antitrust Act, for this purpose, establishes a deeming system limited to the case where large enterprises advance into small and medium enterprise markets. However, in order to raise the efficacy of regulations regarding conglomerate mergers, there also needs to be introduced a system deeming competition-restrictiveness in other cases, for example, in the cases of mergers between large enterprises, mergers between affiliate companies belonging to large enterprise groups, and where affiliated companies merger with other enterprises.

On the other hand, the Antitrust Act prohibits mergers carried out by coercive or other unfair methods *per se*, without questioning the influence that these have on competition. However, this is not appropriate when viewed against the essence of merger regulation. Accordingly, it would be desirable to delete Article 7(3) of the Act, which regulates separately mergers carried out by coercive or other unfair methods, and in terms of merger regulation, to prohibit these mergers in the same way as other mergers only in the case where they substantially restrict competition in a particular business area. Further, of those mergers carried out by coercive or other unfair methods, it would be desirable to regulate those that do not restrict competition by other provisions, for example, by the provisions relating to the prohibition of abuse of market-dominating position or the prohibition of unfair trade practices, provided that these provisions have been violated.

c) Unfair Collaborative Acts

The following issues are contained in the provisions related to unfair collaborative acts under the Antitrust Act. The first is the issue related to the criteria for judging the illegality of collaborative acts, which is "unfairly restricting competition". The second is the issue of the drafting formula that lists the types of

unfair collaborative acts into eight types. The third is issue of the form of the expression "shall not agree" to engage in acts that restrict competition

Firstly, while the Act had hitherto provided that the standard for judging the illegality of collaborative acts was similar to mergers, that is where it "substantively restricts competition in a particular business area", on the occasion of the seventh amendment in February 1999, this was amended to "unproperly restricting competition". The reason was that not only were collaborative acts different to mergers in that their influence on competition was generally negative, but also because the influence was direct, so that in specific cases there was no need to examine the competition-restrictiveness case-by-case. However, the expression "unproperly restricting competition" in the present law, could be read as if the "method" of restricting competition must be unproper and also be misunderstood as meaning that the extent to which competition is restricted must reach an unproper "extent". In fact, this provision means that while it is reasonable that collaborative acts be prohibited in principle, as they are generally competition-restrictive, they can be permitted exceptionally where the influence on competition is slight or there are other justifiable reasons. Accordingly, to remove the above grounds for misunderstanding it would be desirable to amend the wording of Article 19(1) of the Act so that this meaning may be properly expressed.

Furthermore, the stance in the present law of listing restrictively the types of unfair collaborative acts has the weakness of being unable to properly regulate new types of collaborative acts which may appear in various forms accompanying the constantly changing economic conditions. Accordingly, to supplement these weaknesses, it would be desirable to discard this stance and to institute a general provision comprehensively prohibiting these acts.

On the other hand, after 1986, the Act, by providing that "it is illegal to commit an act which restricts competition", took the stance of prohibiting the carrying out of collaborative acts. However, on the occasion of the fourth amendment in 1994, by providing that "it is illegal to agree" to commit this sort of act, it was amended in the direction of prohibiting the agreement itself. Yet it appears that this stance is not reasonable when considered in connection with the elements of the corrective measures in Article 21 of the Act. This is because it is not reasonable to order a corrective measure against an enterpriser in a state where an agreement has been reached but there has yet to be any carrying out of the act. Accordingly, where the

agreement has not yet been carried out, it would be sufficient if enterprisers were to deny the effect of the agreement in accordance with Article 19(4) of the Act, and it would be desirable to make it possible for the Fair Trade Commission to order corrective measures limited to cases where the agreement has been performed in specific terms.

Additionally, regarding the deeming system in Article 19(5) of the Act, which was introduced in order to lessen the difficulties of proof regarding collaboration, there are grounds for misunderstanding in that the wording of the expression is drafted to seem as though even the competition-restrictiveness is deemed in addition to the existence of the collaboration. Yet in the case of collaborative acts, while there is a need to deem collaboration because proving this is difficult as a factual issue, there is no need to deem competition-restrictiveness because this can be judged comparatively easily, unlike in the case of mergers. Accordingly, in order to remove the grounds for misunderstanding, there is a need to amend the wording of Article 19(5) of the Act so that the meaning that it deems only the "collaboration" is clearly expressed.

d) Unfair Trade Practices and Resale Price Maintenance

The Antitrust Act, in order to establish a fair trade order, proclaims that seven types of unfair trade practices are prohibited, and the types and criteria of the specific conduct are prescribed by Presidential Decree. Yet while this method may aid the administrative convenience of the regulatory authorities, not only does it fail to regulate properly new types of unfair trade practices, but there are also fears that it will bring about the result of delegating the criteria for judging the illegality of unfair trade practices to a subordinate statute. Accordingly, in order to enable effective regulation of the various forms of unfair trade practices, it would be desirable to formulate a general provision that can present clearly the criteria for judging the illegality of unfair trade practices and to entrust the matter of the types and criteria of specific conduct to the decisions of the Fair Trade Commission and the judgments of the courts.

Furthermore, while the Act prohibits resale price maintenance in principle, it is permitted exceptionally in the cases of literary works prescribed by Presidential Decree and where enterprisers have received designation in advance by the Fair

Trade Commission for commodities that fulfil set conditions. However, it is doubtful as to whether it is indeed desirable to permit in a wholesale way resale prices in relation to literary works prescribed by Presidential Decree. Further, when viewed in light of the fact that there is not even one commodity that the present Fair Trade Commission has designated separately so as to permit resale price maintenance, in terms of legislative drafting it would be desirable to delete Chapter 7, which provides separately for the prohibition of resale price maintenance, and to regulate this by including it as one type of unfair fair trade practice.

e) Enterpriser Organizations and Restrictions on Conclusion of International Contracts

The Antitrust Act has separate chapters regarding enterpriser organizations and international contracts respectively. It prohibits enterpriser organizations from committing an act unproperly restricting competition or an unfair trade practice. Further, it prohibits, in principle, the conclusion of international contracts where they contain provisions that amount to unfair collaborative acts, unfair trade practices, or resale price maintenance, while allowing these exceptionally where the Fair Trade Commission deems the effect of the said agreement upon competition in a particular business area to be slight or deems that there are other unavoidable reasons for the contract (Article 32).

However, in relation to enterpriser organizations, there is no reason at all to treat enterpriser organizations differently to other enterprisers under the Act because the Enterpriser Organizations Establishment Registration System has been abolished as a part of deregulation. Further, it would seem that there is no reason at all to treat international contracts differently from other conducts owing to the progress of market liberalization and globalisation. Accordingly, in terms of legislative drafting, it would be desirable to delete Chapters 6 and 8 and regulate these respective forms of conduct together in the relevant parts of the Act.

f) Exemptions from Application of the Act

The Antitrust Act, in order that it may perform its several functions as the fundamental law of the economic order, needs to first manifest clearly what areas and conduct are exempted from the application of the Act, and then to fundamentally reconsider whether it is really appropriate to authorise exemptions from the Act in relation to these and whether there is a need to continue to maintain these exemptions. Further, after authorising the conduct and areas for which it is recognised that there are rational grounds that require the authorisation of these exemptions from application, the Fair Trade Commission needs to continually monitor whether this conduct really agrees with the original purpose of the Act.

2. Organizational Aspect

The Fair Trade Commission investigates the conduct of enterprisers that it suspects of having violated the Antitrust Act and decides whether there has been a violation of the law. The Fair Trade Commission has both the characteristics of a regulatory body, which performs a judicial function including the ordering of corrective measures or the imposition of surcharges against violators, combined with the characteristics of a policy body to form and enforce competition policies. However, the present organization composed of a meeting-style organization of nine commissioners is not only unsuitable for fulfilling a judicial function, which is its main function, it is also very inefficient. Further, the Fair Trade Commission, in terms of fulfilling a judicial function, must fulfil its affairs independently, solely according to the law and its conscience. However, in relation to the structure of the Fair Trade Commission, not only is the President to appoint the chairman and the deputy chairman upon the recommendation of the Prime Minister and the other commissioners upon the recommendation of the chairman, under the present system whereby the chairman is to attend ministerial meetings, it is very difficult for the Fair Trade Commission to perform its affairs independently from the government. Accordingly, if the Fair Trade Commission is to be enabled to perform its main function, the judicial function, independently, there is a need to consider proposals that can strengthen its independence in terms of its structure.

On the other hand, although the Act establishes a secretariat in order to deal with

the affairs of the Fair Trade Commission, legally this secretariat is established similar to an advisory body of the meeting body, which is the Committee. However, in reality, the chairman of the meeting body or Committee represents the whole of the Committee and also, in the human resource reality, sometimes a bureau chief of the secretariat is promoted to a permanent commissioner, the secretary-general of the secretariat becomes part of a government committee together with the chairman and deputy-chairman, and then the permanent commissioner is promoted to secretary-general of the secretariat. Therefore, in terms of the organisational management of the Fair Trade Commission, the secretariat is not managed as an advisory organ that deals with the affairs of the meeting body or Committee. The reality is that it is managed like a general administrative department, composed of a pyramid structure with the chairman as the apex and, underneath this, the deputy-chairman, secretary-general and respective bureau chiefs and division chiefs. As a result, in terms of the management of the Fair Trade Commission, while the meeting body or Committee is meant to perform the central role, one gets the feeling that in reality the secretariat is performing the central role and the Committee is managed as if it were the advisory organ of the chairman. Additionally, in spite of the main function of the Fair Trade Commission being a judicial function, in terms of the personnel structure, because lawyers are absolutely lacking and economic bureaucrats play the leading role, there is a tendency to place more importance on policy and political considerations rather than legal examination and analysis throughout the law enforcement process, including the investigation and deliberation of conduct violating the Act and handing down corrective measures.

Accordingly, in order for the Fair Trade Commission to overcome these problems and perform its judicial function, which is its main function, combined with satisfactorily performing its policy function, there is a need to unite into one organization what has become split into a deliberative organ, the Committee, and an advisory organ, the Secretariat, and to divide this according to the actual functions, that is, into a deliberative part that investigates and deliberates individual cases and a policy part to establish and enforce competition policy. Further, it would be desirable to divide the deliberative part into seven or eight divisions by respective economic field like Germany, entrusting each individual division to a division head under the respective commissioner, placing two to four investigators (presently bureau chiefs and section chiefs) under this, and making it so that deliberations in individual cases

are decided by the agreement of three of these officers including the division head. In this case, each deliberative division would have a character similar to a court's collegial divisions. In order that these deliberative divisions can perform their functions properly, they would need to recruit large numbers of able lawyers to the divisions. On the other hand, it would be desirable for the policy part to maintain an organizational structure similar to the present one, but it would not be involved in the investigation or deliberation of specific cases. It would instead establish and enforce economic policies from a long-term viewpoint and perform duties such as amending and abolishing anti-competitive laws and regulations and cooperation with related foreign and domestic agencies.

3. Procedural Law Aspect

While the Antitrust Act is to be enforced by investigations, corrective measures, surcharges, the victim's claim to compensatory damages, criminal sanctions and other procedures, the central procedures among these are the corrective measures and surcharges by the Fair Trade Commission. Further, the claim for compensatory damages is premised on the corrective measures of the Fair Trade Commission, and for the criminal sanctions a public suit can only be commenced upon complaint by the Fair Trade Commission.

Similarly, the reason that the Act focuses on an administrative approach by the Commission in relation to enforcement of the Act is that it is considered that specialist investigation and analysis of the relevant market structure, the conduct and its outcome is essential in terms of investigating and deliberating violations of the Act. However, among these violations of the Act, while a specialist examination is essential for judgments related to the illegality of the abuse of a market dominating position and anti-competitive enterprise combinations, this sort of examination is not always essential in cases like hard-core cartels and unfair trade practices. Accordingly, there is no longer any need to maintain the administrative approach in relation to this sort of conduct. Also, in the other cases where a specialist examination is not so essential, it would be desirable that the administrative approach be relaxed and that the police, enterprisers in a competitive relationship with the violating enterpriser, and consumers be allowed to participate actively in the process of enforcing the Act. In relation to this, one needs to heed the point that recently in

America 90% of cases violating the antitrust laws have been remedied by claims for compensatory damages as well as the point that, from the viewpoint of the establishment of a competition order, remedies through private law such as compensatory damages are evaluated even more highly than direct regulation by the state.

III. Control of the Concentration of Economic Power

A. The Problem of the Concentration of Economic Power

In Korea, as economic power is especially concentrated to an extreme degree in a few *chaebol*, this presents the following three-dimensional problem. First, because the relative weight that a few *chaebol* occupy in the total national economy is very high, there is a concern that they themselves operate as a private power ("general concentration"). Second, among the affiliate companies that compose the *chaebol*, because there are many cases in which these occupy monopolistic or oligopolistic positions in various markets, there is a concern that they obstruct the functioning of the relevant markets ("market concentration"). Third, because these *chaebols* are in fact owned and controlled by the families or relatives of particular individuals, there is a fear that at the same time as deepening the inequality of income distribution they obstruct rational management ("ownership concentration"). However, the Government regards the *chaebol* issue as one of the main causes of today's economic crisis. To resolve this problem quickly, in January 1998, corporate structure reforms called the "five big principles" were agreed on between President-elect Kim Dae-jung and the *chaebol* top management which were: to raise management transparency, to eliminate mutual debt guarantees, to improve finance structures, to establish core corporations; and to the strengthen managerial responsibility. Also, various types of systemic devices were prepared to enforce these. While it is true that considerable systemic improvements have been achieved under these five big principles, since domestic and international economic conditions have changed greatly during this period and systemic blockages have emerged in some areas, President Kim Dae-jung, by means of a celebratory speech on August 15, 1999, announced an additional 3 principles-the separation of

industrial capital and financial capital, the prevention of circular investment and illegal insider transactions, and cutting off irregular inheritances - as measures to supplement the five big principles. However, among the problems of the concentration of economic power by the *chaebol*, those having a direct relationship with the vitalization of the market economy are general concentration and market concentration. Since we have already examined the problem of market concentration previously as the problem of monopolies and oligopolies, here we make the focus on general concentration and consider only the regulations under the Act for the solving of this problem.

B. Control of the Concentration of Economic Power by Chaebol

In order to restrict the excessive concentration of economic power by the *chaebol*, the Act, through its first amendment in 1986, started to prohibit the establishment of and conversion into holding companies and at the same time introduced investment regulation systems such as prohibiting mutual investment and restricting the gross amount of investment by affiliated companies belonging to large enterprise groups. In 1992, a system restricting mutual debt guarantees between affiliated companies was introduced. Further, in 1998, in order to formulate legal devices for realising the structural adjustment of large business groups, the system of restrictions on gross amount of investment was abolished and in its place new mutual debt guarantees were prohibited in principle, and existing debt guarantees had to be annulled by March 31, 2003. Additionally, in February 1999, in order to complete the structural adjustment of enterprises as soon as possible, the establishment of holding companies was permitted subject to restrictions, and in order to block effectively the unfair assistance between affiliated companies of the thirty largest enterprise groups, the right to request financial trading information was introduced. In December of the same year, the system of restrictions on gross amount of investment was reintroduced, and in order to prevent unfair internal trade effectively, internal trade above a set amount had to be disclosed in advance by resolution of the board of directors. On the other hand, in 2001, in order to promote the structural adjustment of companies through the establishment of holding companies, the exceptions regarding restrictions on the conduct of holding companies were expanded. In 2002, at the same time as the standards for the

designation of large enterprise groups were revised, the Act was revised to expand the exceptions related to the prohibition of mutual investment between affiliated companies and the restrictions on gross amount of investment.

1. Restricted Permission of Holding Companies

While the establishment of holding companies had been prohibited in principle from the first amendment of the Act in 1986, in order that the desirable functions of holding companies such as the division and sale of non-core companies and promoting the attraction of foreign capital be activated, the establishment of holding companies came to be permitted with restrictions in 1999 (Article 8). However, so holding companies would not be used as a means of concentrating economic power, the conditions for establishing these were strictly limited. To stop holding companies from expanding subsidiaries by excessive external borrowing, the debt ratio was limited to within the range of the total capital of the holding companies, the equity ratio in individual subsidiaries was required in principle to be maintained at least 50%, and the owning of stocks of a domestic company other than those of a subsidiary for control purposes was prohibited. Further, to prevent large companies from using financial institutions as a private safe, it was prohibited to place financial and non-financial companies under one holding company. Moreover, to prevent holding companies from controlling many companies by multi-level investment methods, it was forbidden in principle to have "grandchild companies" (Article 8-2(2)). On the other hand, where the same person who controls a company belonging to an enterprise group subject to limitations on debt guarantees or the person with special interests in the same person intends to establish a holding company or convert the company into a holding company, that person shall have the existing debt guarantees annulled (Article 8-3).

While these regulations on holding companies are modelled on Japanese law, in Japan in 1997 they changed their hitherto stance, which had been to prohibit in principle the establishment of, or conversion to, holding companies. This is now permitted in principle, while only the establishment of, or conversion to, holding companies that would bring about the excessive concentration of market power is prohibited. In other words, while holding companies are permitted in principle, only holding companies contrary to the purpose of the Antitrust Act are prohibited, and

guidelines are instituted for these. Yet since Korea permits the establishment of holding companies without having these in principle prohibitions, there are concerns that holding companies may be used as a means of concentrating economic power. Accordingly, in order to resolve these issues, it would be desirable to, like Japan, prohibit holding companies that would bring about the excessive concentration of market power and only permit holding companies about which there are no such concerns.

2. Regulation of Large Enterprise Groups

The Act comprehends the *chaebol* as enterprise groups. Yet the Act does not regulate all enterprise groups, only large enterprise groups above a certain scale. That is, the Act requires the Commission to designate annually large enterprise groups subject to the application of the Act divided into the following: "enterprise group subject to the limitations on mutual investment"; "enterprise group subject to the limitations on total investment amount"; and "enterprise group subject to the limitations on debt guarantees" (Article 14). Further, in relation to companies that belong to large enterprise groups, mutual investment and mutual debt guarantees are prohibited in principle and the total amount of investment is limited to 25% of the relevant company's net asset amount.

a) Regulation of Mutual Investment

The Act prohibits in principle the mutual investment between companies belonging to an enterprise group subject to the limitations on mutual investment. However, this is permitted exceptionally in the cases of a merger of companies or acquisition of a whole business and an enforcement of security rights or the receipt of an accord and satisfaction (Article 9). The prohibition of mutual investment is a system for stopping the artificial inflation of capital or the expansion of affiliated companies. This was originally a system that had been provided for in the Securities Trading Act and the Commercial Code in order to realise the principle of capital adequacy. However, as the same system had begun to be used as a means of preventing the concentration economic power, it came to be provided for in the Act to regulate this more effectively.

b) Restrictions on Total Amount of Investment

In order to stop a company belonging to an enterprise group subject to the limitations on total investment amount strengthening its control over another domestic company by owning shares in that company, the Act introduced and enforced a system limiting total investment through the first amendment in 1986. However, for the reason that there were concerns that, under the 1998 IMF management regime, this system would act as a factor obstructing corporate structural adjustment, it was abolished by the sixth amendment in 1998. As soon as this system was abolished, total investment in affiliated companies of large enterprise groups increased conspicuously so that not only could the chairmen of large enterprise groups easily control affiliated companies with a small equity share, but various problems emerged such as only the nominal debt ratio decreasing without a substantial increase in real capital. Therefore, in order to prevent circular investment between affiliated companies in large enterprise groups, the government revived this system in December 1999, and revised it again in December 2004 (Article 10) .

c) Prohibition of Mutual Debt Guarantees

In Korea, as a result of the mutual effect of irrational management customs between enterprises and financial institutions, debt guarantees have been established as a custom. In spite of the fact that enterprises belonging to large enterprise groups did have good credit conditions, through the debt guarantees of affiliated companies, they had come to obtain bank credit much in excess of their ability. Financial institutions went about business carelessly by relying on security and joint guarantees without examining in detail the credit situation of the company at the time of the loan. However, debt guarantees made it difficult for those companies, especially small and medium enterprises, who lacked capital or could not get guarantees to obtain credit from financial institutions. On the other hand, large enterprise groups, which controlled many affiliated companies and could make debt guarantees, were easily able to receive much credit from financial institutions, thus deepening the credit imbalance phenomenon. Furthermore, in the case of enterprise groups, this weakened the whole finance structure of the large enterprise groups and obstructed fair competition by making it possible for irrational debt management.

Additionally, not only did this become a major cause of the recent financial crisis, including the weakness of some of the affiliated companies bringing about a chain of bankruptcies in the whole group and the weakening financial institutions, this also was a factor making structural adjustment through the cleanup of affiliated companies impossible in practice in that it had connected the affiliated companies like a spider's web.

To solve these issues, the Act, through the third amendment in 1992, restricted the limit of the debt that companies belonging to large enterprise groups could guarantee for domestic affiliated companies to 200% of capital. The Act then lowered this limit to 100% in 1996. In 1998, by accepting the IMF demand to resolve debt guarantees between affiliated companies quickly, the Act prohibited in principle new debt guarantees while requiring the annulment of existing debt guarantees completely by March 31, 2000.

d) Prohibition of Unfair Assistance - Capital, Assets, Human Resources

According to the transaction cost approach of enterprise theory first presented by Coase, when transaction costs resulting from market transactions are high the company pursuing profit maximisation prefers transactions within the company to market transactions, in order to reduce transaction costs. Since factors such as close business-state relations, corrupt structures across society, lack of formed legalism, small-scale markets, distortions in financial markets, and so on, raise the market transaction costs of enterprises, many enterprises have internalised substantial amounts of trade in order to decrease these transaction costs. However, while these internal transactions do have positive aspects such as reducing transaction costs or raising internal efficiency through vertical integration, on the other hand, there are concerns that these cause various negative effects such as obstructing fair trade or deepening the concentration of economic power, by securing for affiliated companies "competitive advantages unrelated to efficiency" through the giving of preferential treatment or assistance without justifiable reasons. Accordingly, the Act prohibits internal transactions where they have the character of unfair assistance.

Unfair assistance can be classified into assistance through trade of goods and services and assistance through trade of capital, assets and human resources. From July 1992, the Commission strengthened the monitoring of assistance through trade

of goods and services by establishing the "Examination Standards for Unfair Trade Practices of Large Enterprise Groups". However, they were not able to regulate effectively assistance through capital, assets and human resources because of a lack of the legal basis to enable them to do so, notwithstanding that the effect of the assistance had been relatively large and direct. Accordingly, though the amendment of the Act in late 1996, the legal basis was provided to enable the regulation of assistance through the entire trade in assets including assets, capital, human resources, real property, marketable securities, and choses in action. From July 1997, in order to secure transparency and objectivity in law enforcement, the "Examination Guidelines for Unfair Assistance" were established and are presently applied.

The Act, at the time of its amendment in 1996, regarded this system as a means of preventing the concentration of economic power, so it tried to provide for this in Chapter 3, which restricts business combination and economic concentration. However, this was criticised in business circles as unreasonable for only applying to affiliated companies, on the grounds that this assistance could be accomplished not only between affiliated companies in large enterprise groups but also between general enterprisers. Following these criticisms, this provision was provided for in Chapter 5, which prohibits unfair business practices, in order to apply it to all enterprisers. However, the reason why unfair assistance became an issue was not simply because of concerns about obstructing fair trade but also because of concerns about it being used as a means of concentrating economic power. Because the latter was occurring mainly between affiliated companies in large enterprise groups, as a matter of legislative suggestion, there is a need to first move these provisions to Chapter 3, and then to show their purpose clearly and to limit their applicable objects. On the other hand, the 1999 amended law granted to the Commission the power or the right to demand financial trading information in order to investigate effectively unfair assistance by affiliated companies belonging to large enterprise groups.

In the Korean *chaebol*, the chairmen vertically manage the entire group taking advantage of the fact that they own and control numerous affiliated enterprise *de facto*, so while the incentive to assist affiliated companies who suffer management difficulties is very strong, on the other hand, not only has the Commission been unable to complete the systems that enable surveillance and control, such as the drawing up of combined financial statements and the strengthening of minority shareholder rights, but also the Commission is unable to deal with this matter

properly because of limitations in terms of investigatory powers and human resources. Accordingly, in order to eradicate unfair assistance, one must improve the control structure of enterprises to make each *chaebol*'s affiliated enterprises operate independently focusing on the individual companies. At the same time there is a need to fix related systems in order to expose clearly the state of internal transactions through the accounting system and to stop the outflow of company profits from affiliated enterprises. For this purpose, there is a need to introduce consolidated financial statements and advance the accounting reporting system, together with considering proposals to expand the introduction of the system of external directors and auditors and to strengthen minority shareholder rights.

C. Proposals for Revision of the Current Law to Control Concentration of Economic Power

To prevent the concentration of economic power, the Act, at the same time as permitting holding companies subject to restrictions and prohibiting in principle mutual investment and mutual debt guarantees by companies belonging to a large enterprise group, also restricts the total amount of investment to a set scale. Yet while one can say that these controls have contributed to some degree to stopping the exacerbation of the problem of the concentration of economic power, it is evaluated that it has not been able to reach the point of preventing this. There are many reasons for this, but the main reasons are the following, in my view. Firstly, while it is true that the systems that prohibit and restrict conduct in the Act are the representative methods that were traditionally used as a means of concentrating economic power, there could be several other measures for concentrating economic power other than these, hence it has been impossible to effectively prevent the concentration of economic power with only these systems. Secondly, while the Act either restricts or prohibits in principle mutual investment, mutual debt guarantees and the total amount of investment, one can say that this regulation could be exhaustive because it permits broad exceptions.

On the other hand, if one looks at this in light of the seriousness of the problems with the concentration of economic power by a few *chaebol* in Korea, while it is true that this problem must be solved quickly, it is impossible not to raise doubts about the appropriateness of regulating this in the Act, as is the case at present. This is

because the concentration of economic power by the *chaebol* in Korea, being a problem bringing together issues of general concentration, market concentration, and ownership concentration, cannot be stopped simply at the dimension of the competition system. The reason for this is that it is not appropriate to regulate this issue in the Act, which is aimed at maintaining fair and free competition in individual markets. It is a complicated issue at the political, economic, business, cultural and social dimensions and is a highly political issue that raises delicate problems. Furthermore, if the Commission comes to handle the issue of concentration of economic power by the *chaebol*, it cannot escape this problem's characteristic political influences, because there are concerns that it could make difficult the performance of the essential duties of the Commission, which must view the competitive system from the long-term perspective independent from political power or the government's policy influence. Accordingly, in the long term, the government should establish comprehensive policies for the prevention of concentration of economic power, and should implement these by entrusting these to a separate independent agency, removing these from the Antitrust Act.

IV. Conclusion

While the Fair Trade Commission endeavours to solve at the same time many kinds of issues which have very different dimensions, it appears that it is making the mistake of not being able to execute properly even its original role of maintaining a fair and free economic order. Accordingly, in future, it would be desirable for the Fair Trade Commission not to embrace all these problems and thereby become overstretched, but to devote itself solely to the fundamental duty it must perform, that is, the work of maintaining and realizing in certain terms a fair and free economic order, which is the precondition to realizing the proper functioning of the market economy. Other duties such as, for example, the prevention of the concentration of economic power, should be transferred to a separate body suitable to be in charge of this, and on the other hand, matters which are mainly related to conflicts between parties such as the regulation of unfair trade practices should be entrusted to private remedies by the courts, so that the parties can resolve these themselves.

Enforcement Direction of Competition Law

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Abstract

The Monopoly Regulation and Fair Trade Act (hereinafter MRFTA: Korea's competition law), which was enacted in 1980, has been introduced and enforced to achieve more mature market economy. In order to normalize distorted market functions arising from the government-led economic growth, the activities such as abusive behavior of market dominance, cartel, anti-competitive M&A and unfair trade practices were prohibited under the law. However, since the mid 1980s, due to rising problems of excessive concentration of economic power and influence from large business conglomerates, or Chaebols, the Korea Fair Trade Commission (hereinafter KFTC: Korean government agency for enforcement of the competition law) has amended the MRFTA many times, imposing restrictions on shareholdings and transaction practices, such as prohibition of cross shareholdings and debt-guarantee between affiliates, restriction on total amount of shareholdings in other domestic companies, and prohibition of undue intra-group transactions. In addition, the KFTC enacted the Fair Subcontract Transactions Act for small- and medium-sized enterprises (SMEs) not to face undue disadvantages in subcontract transactions, which can often arise from asymmetric negotiation powers between SMEs and large companies. Such regulations on large companies are causing a lot of criticisms these days as every aspect of the Korean economy has become more and more exposed to international competition with acceleration of globalization. Therefore, by getting various ideas from a wide range of opinion groups since early 2003, the government established the 3-Year Market Reform Roadmap which aims at facilitating market functions through regulatory reform as well as reinforcement of cartel regulation and prohibition of unfair trade practices. In addition, for large business conglomerates, the roadmap is designed to enhance transparency in business management and improve corporate governance, while streamlining previous regulations on them. By evaluating the performance of the improvement of corporate governance, the government will review whether to abolish or ease the regulations on large companies after 3 years of implementation of the Roadmap. This policy direction was reflected on the amended MRFTA in late 2004.

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